

Update Revocation of Probation and Supervised Release

Aggregate: p 26 iii

U.S. v. Mazarky, No. 06-13316 (9-12-07)(11th Cir.).

The district court is required to reduce the new term of supervised release by the aggregate length of imprisonment already served following his first revocation of supervised release.

Presence: p 7-a

U.S. v. Smith, No. 07-1246(8-21-07)(11th Cir.).

The relevant punishment for an individual who fails to appear in court as required for revocation of supervised release is the period of incarceration available for the underlying offense which led to the imposition of the supervised release and *not* the period available for the supervised release violation.

Departures: p 29

U.S. v. Hargrove, 497 F.3d 256 (2nd Cir. 2007).

It is not necessary for the district court to give the Defendant notice before sua sponte imposing a sentence outside the range recommended by the applicable Sentencing Guidelines policy statements for violation of supervised release.

The court has never held guidelines binding over sentences for revocation for supervised release and thus *Booker* has essentially no effect. Rather, the court is to consider the non-binding policy statements of the Chap 7 guidelines manual and has broad discretion to impose a sentence up to the statutory maximum.

U.S. v. Baker, 491 F.3d 421 (8th Cir. 2007).

The district court was not required to give notice to defendant prior to imposing sentence for revocation of supervised release under advisory sentencing guidelines which exceeded the suggested guidelines range.

U.S. v. Leppa, 469 F.3d 1206 (8th Cir. 2006).

If the district court's imposition of a higher term of supervised release was a mistake rather than a departure or a variance, this constitutes plain error which prejudiced the defendant. The case should be remanded for re-sentencing.

Delay: p 7 —2

U.S. v. Crisler, No. 07-2072 (8-8-07) (10th Cir.).

The district court lacks the ability to revoke the probation after the term of probation has expired unless the delay in revocation was reasonably necessary and a warrant or summons issued before the expiration date.

Additional Supervised Release: p 28 iii

U.S. v. Martinez, 496 F.3d 387 (5th Cir. 2007).

Johnson v. U.S. (529 U.S. 694 2000), which interpreted 18 U.S.C. § 3583(e)(3) to permit district courts to impose a term of supervised release after revoking the initial term of supervised release is applied retroactively.

Factors in determining length of sentence: p 27 d

U.S. v. Simtob, 485 F.3d 1058 (9th Cir. 2007).

The district court may not impose a revocation of sentence solely or primarily based on the severity of the new criminal offense underlying the revocation, as the sentence for that offense is left to the sentencing courts. *U.S. v. Miquel*, 444 F.3d 1173 (9th Cir 2006). However, the district court can look to and consider the conduct underlying the revocation as one of many acts contributing to the breach of trust.

U.S. v. Manzella, 475 F.3d 152 (3rd Cir. 2007).

18 U.S.C. § 3582(a) prevents the sentencing court from promoting the rehabilitative goals of § 3553(a)(2)(D) in either imposing a term of imprisonment or determining the length of such. The note at the end of § 3582 instructs that the factors should be considered *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation*.

U.S. v. Jones, 484 F.3d 783 (5th Cir. 2007).

Rule 404(b) requires that evidence of prior crimes (1) be relevant to issues other than character propensity and (2) have probative value that outweighs prejudice to the defendant. The district court erred in allowing the government to introduce evidence of defendant's prior firearm conviction in revocation.

Post-Booker standard of review and method of review: p 19 –3

U.S. v. Red Feather, 479 F.3d 584 (8th Cir. 2007).

When determining the appropriate range on revocation of supervised release the court is to consider the recommended sentencing range and also the § 3553(a) factors. Sentences imposed following revocation of supervised release are subject to review at a reasonableness standard. Extraordinary variance must be supported by extraordinary circumstances.

U.S. v. Brown, No. 06-2249 (9-4-07)(6th Cir.).

When imposing a term of imprisonment following revocation of supervised release, the district court must consider the policy statements in the sentencing guidelines and the statutory factors listed in 18 U.S.C. § 3553(a). The proper standard for review of the sentence post-*Booker* has not yet been determined in this circuit.

U.S. v. Hendershot, 469 F.3d 703 (8th Cir. 2006).

Review of a sentence for violation of supervised release should follow a two-step process. First, determine whether the district court correctly applied the guidelines under a *de novo* review. Second, review the sentence for reasonableness post *Booker*. If the defendant benefitted from a departure of criminal history during the initial sentencing, the re-sentencing court should calculate his criminal history category as it was before departure was granted. The court then *may* or may not again grant departure within its discretion.

U.S. v. Moulden, 478 F.3d 652 (4th Cir. 2007).

The fourth circuit has held that revocation supervised release sentences should be reviewed to determine whether they are 'plainly unreasonable' with regard to the 3553(a) factors. Probation violations are functionally equivalent. Probation sentences are not guidelines sentences as they are non-mandatory-even pre *Booker*. In determining whether the sentence was 'plainly

unreasonable' the court must first determine it is unreasonable. Only if it is can the court question whether it was plainly, or obviously so.

U.S. v. Flagg, 481 F.3d 946 (7th Cir. 2007).

Court declines to consider whether *Booker* replaced the "plainly unreasonable" standard for sentencing review with one of "reasonableness." Both are satisfied. *Apprendi* requires that every fact used to support an increase in sentence must be either admitted or proved by the jury beyond a reasonable doubt. The proper method for challenging conviction is collateral review not revocation proceedings.

U.S. v. Bunger, 478 F.3d 540 (3rd Cir. 2007).

The appellate court reviews sentence imposed upon revocation of supervised release for "reasonableness" post *Booker*. In order to be reasonable the record must reflect that the court gave meaningful consideration to the factors and reasonably applied the factors to the circumstances of the case. When supervised release terms are violated under 3583(e) the court must consider the 3553(a) factors and impose a sentence of not more than 5 yrs if it finds the defendant violated. In sentencing the court must consider the policy statements under chap 7 of the sentencing guidelines.

U.S. v. Sindima, 488 F.3d 81 (2nd Cir. 2007).

Sentences for violation of probation should be assessed for reasonableness after *Booker*. The court has abused discretion when its decision cannot be located within the range of permissible decisions or is based on either an error of law or a clearly erroneous factual finding. When the sentence is outside the guideline range, the court must state with specificity the reasons for the sentence imposed.

Statutory limits on sentencing: p 25 i

U.S. v. Ray, 484 F.3d 1168 (9th Cir. 2007).

Booker does not define the statutory maximum as the high end of the Guidelines range for sentences imposed for violations of supervised release. The definition of the maximum comes from the United States Code, and always has. *Booker* has no effect on revocation of supervised release.

Concurrent v. Consecutive: p 16

U.S. v. Dees, 467 F.3d 847 (3rd Cir. 2006).

A district court may sentence a defendant for revocation of supervised release conditions consecutively even though the initial sentences ran concurrently. The plain letter of § 3584(a) governs. Post-revocation penalties are part of the initial sentence and do not violate the double jeopardy clause. The proper standard for violation of supervised release is a preponderance of the evidence. There is no right to jury trial for post-conviction determinations.

Defendant's right to speak: p 9 b

U.S. v. Pitre, No. 06-3935 (10-3-07)(7th Cir.).

The district court must afford the defendant the right of allocution before imposing a term of reimprisonment following a revocation of supervised release. (The court asks the defendant if she wishes to make a statement for the court to consider.) If the right to allocution has been

violated the appeals court will assume prejudice when there is any possibility that a lesser sentence would have been imposed. Nevertheless, the court will remand only if the facts illustrate that the violate affected the fairness, integrity or public reputation of the proceedings.

U.S. v. Campbell, 473 F.3d 1345 (11th Cir. 2007).

The district court is required to give the parties an opportunity to object to the court's ultimate findings of fact after imposing a sentence. This applies to revocation of supervised release. If the court fails to elicit objection then the case will be vacated and remanded. (Called a *Jones* violation). Asking "is there anything else" is not sufficient to meet this requirement. The court must consider the sentencing range imposed by the guidelines. If it is not clear that the sentencing guidelines have been considered, then the case should be remanded for guideline discussion.

Supervised Release Testing: p 25

Plethysmograph:

U.S. v. Lee, No. 06-5848 (9-13-07) (6th Cir.).

Conditions of supervised release may be ripe for appellate review immediately following the imposition. However, in this case, the imposed condition of potential penile plethysmograph is not ripe for review for two reasons. First, there is no guarantee that defendant will ever be subjected to the testing as it may occur 14 years from the present. Second, the intrusive nature of the test has been the subject of recent due process concerns and may not be in use by 2021.

Drug Testing: p 25 v

U.S. v. Tejeda, 476 F.3d 471 (7th Cir. 2006).

As a special condition of supervised release, participation in a program of drug testing should be determined at the discretion of the court and not at the hands of a probation officer. Granting the probation officer that authority to require testing is error. But it does not constitute plain error because it does not seriously affect the fairness, integrity, or public reputation of the proceedings. The defendant cannot show that he would have been better off had the judge imposed the drug testing himself. Furthermore, the condition can be altered at any time through a motion to modify the conditions of supervised release.

U.S. v. Lewis, 498 F.3d 393 (6th Cir. 2007).

It is a standard condition of supervised release that defendant shall permit the probation officer to visit him at any time at home *or elsewhere* and shall permit confiscation of contraband in plain view. Refusal to provide the officer with the location where defendant spends numerous nights a week may result in violation of release.

When imposing a sentence for violation of supervised release it is not error to consider factors in § 3553(a)(2)(A) even though they are not specifically enumerated in § 3583(e). The sentencing court is not prohibited from these (A) factors as long as they consider the (e) factors as well. The 2nd Circuit concurs.

DNA testing: p 25

U.S. v. Reynard, 473 F.3d 1008 (9th Cir. 2007).

Failure to provide a blood sample (DNA act 2000) as a condition of supervised release is a

misdemeanor. The DNA act does not violate the Fourth Amendment. *United States v. Hugs*, 384 F.3d 762 (9th Cir. 2004). The act does not have an impermissibly retroactive effect. Although the act fails to meet the high standard of clear and unambiguous expression of retroactive intent from the legislature (St. Cyr Step 1), it is not impermissibly retroactive because the defendant was on notice about modification of SR conditions. Thus, although the DNA act does impose a new duty on transactions already completed (requiring DNA), the defendant agreed to accept future changes. Further, the act doesn't violate the ex post facto clause because it does not alter the definition of a crime or increase the punishment for criminal acts. Next, the court asserts that the fifth amendment is not implicated because blood samples are not testimonial. The final discussion relates to the power of congress under the commerce clause (Art. I, § 8, cl.3). The court asserts that Congress has the authority to dictate all of the conditions of SR as connected to the commission of a federal offense. Thus, each individual condition of supervised release does not need to satisfy the CC. Supposing however that the act itself did require commerce power, the act is valid under Lopez category 2 (the instrumentalities of interstate commerce and the persons or things in interstate commerce). The DNA samples are a "thing in commerce." Under *Reno v. Condon*, 528 U.S. 141 (2000), Congress can regulate release of personal information even if non-economic in nature. (DPPA regulates the release of drivers' personal information held by DMV). Because DNA samples are personal identifying information, congress can regulate them under the CC. The dissent, by Judge PREGERSON takes issue with the court's commerce clause analysis. He determines that *Condon* is distinguishable because in that instance, Congress sought to regulate information that was already in the stream of commerce. In this case, Congress seeks to take blood from a parolee and *place it in the stream of commerce*.

Sufficiency of Evidence: p 6 –7

U.S. v. Salcido, No. 06-10546 (10-19-07)(9th Cir.).

A challenge to whether pornographic images actually depict minors is properly a sufficiency of the evidence claim and not an authentication claim. The Ninth Circuit agreed with all other circuits in concluding that expert testimony is not necessary to establish that the actor is a minor. In this case, the detective's testimony corroborated the victim's status as minor. The court will keep open the question of whether the images alone are enough to meet this burden.

Constitutional concerns: p 6 H

U.S. v. Soltero, No. 6-50257 (10-19-07)(9th Cir.).

Rule 32(i)(1)(A) requires the district court to verify that the defendant has read and discussed the PSR with his attorney. "Verify" does not necessarily mean that the court need specifically ask the defendant whether he has read the report, but, it must reasonably rely on evidence indicating that the defendant has indeed done so. Harmless error analysis applies. The court did not err in delegating to the probation officer the power to determine whether the defendant has sufficient funds to pay for treatment and to require such payment. (Hawkins dissenting would distinguish between the two). In addition, the district court abused its discretion by requiring the defendant to go by a legal name he had never before used. Finally, the condition requiring that the defendant not associate with members of a specific street gang was not impermissibly vague. However, non-association with a member of a "disruptive group" was vague because it may be interpreted to include a labor union, political protestors, or sports fans.

Miscellaneous Topics

Juveniles:

U.S. v. Juvenile Male, 470 F.3d 939 (9th Cir. 2006).

If a juvenile delinquent violates probation he should be resentenced under the Federal Juvenile Delinquency Act (FJDA) and not under the Sentencing Reform Act of 1984. The focus of the FJDA is not punishment but rather rehabilitation of the child within the community.

Can't Remit Restitution:

U.S. v. Roper, 462 F.3d 336 (4th Cir. 2006).

After a violation of supervised release, the court does not have the authority to remit a restitution order because the MVRA makes restitution to the victim mandatory. Likewise, the court cannot remit the special assessment *sua sponte* because the statute clearly states that imposition of a special assessment is mandatory.

Boot camp revoked:

Serrato v. Clark, 486 F.3d 560 (9th Cir. 2007).

Defendant has standing to challenge Bureau of Prison's termination of boot camp. However, as this decision is one that was "committed to agency discretion by law," it is not susceptible to judicial review. The *Lincoln test* provides that "as long as the agency allocates funds from a lump sum appropriation to meet permissible statutory objectives, the court cannot intrude. The BOP decision was prompted by budget constraints and did not require notice or comment.

Standard for Booker sentencing:

U.S. v. Bridgewater, 479 F.3d 439 (6th Cir. 2007).

The district court reviews a sentence for reasonableness according to *Booker*. A sentence is unreasonable when the district judge fails to consider the applicable guideline range or neglects to consider the other 3553(a) factors. The record shows that the court carefully considered both and the lengthy sentence was properly founded. (This is an initial sentencing case not one for sentence after revocation of release. In that context the 6th standard is unclear).

U.S. v. Lorenzo, 471 F.3d 1219 (11th Cir. 2006).

On remand for re-sentencing under the post-*Booker* advisory scheme, post-sentencing rehabilitative measures should not provide a basis for downward departure. A sentence that is based entirely upon an impermissible § 3553 factor is unreasonable and should be vacated.